STATE OF MICHIGAN

IN THE MICHIGAN SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v JOHN DAVID VANDERPOOL, Defendant-Appellant. /	Supreme Court No. 158486 Court of Appeals Case No. 337686 Tuscola County Circuit Court Nos. 13-012652-FH; 16-013674-FH Hon. Amy Grace Gierhart

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APPELLANT JOHN DAVID VANDERPOOL'S CORRECTED SUPPLEMENTAL BRIEF

ORAL ARGUMENT REQUESTED

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STATEMENT OF APPELLATE JURISDICTION

The Court has jurisdiction to grant leave or take other action on Mr. Vanderpool's application under MCR 7.305 because his application was filed on October 2, 2018, which is within 56 days after the Court of Appeals issued its published opinion resolving his appeal.

STATEMENT OF QUESTIONS PRESENTED

1. Did the Tuscola County Circuit Court have jurisdiction to extend Mr. Vanderpool's probation on September 15, 2015?

   The Tuscola County Circuit Court answered: Yes

   The Court of Appeals answered: Yes

   Appellant answers: No

2. Did the extension of the probationary term without notice or hearing violate Mr. Vanderpool's due process rights?

   The Tuscola County Circuit Court answered: No

   The Court of Appeals majority answered: No

   Appellant answers: Yes

INTRODUCTION

Mr. Vanderpool's court-ordered, two-year probation period expired in June of 2015. Three months later, on the ex parte petition of the probate officer, the court extended Mr. Vanderpool's probation based on the probation officer's representations that Mr. Vanderpool had not regularly reported and had not paid court-ordered fines and costs. It is undisputed that Mr. Vanderpool never received notice of the petition to extend his probation or an opportunity to respond to the probation officer's accusations before the trial court granted the extension. The Court of Appeals in a split, published decision accepted this process. This Court should not.

No person may be deprived of life, liberty, or property without due process, and there is no question that the extension of probation is a deprivation of liberty. Not even the panel below disputed that liberty interests were at stake. Rightly so, as the United States Supreme Court has already held that probation, like incarceration, is a deprivation of absolute freedoms enjoyed by ordinary citizens. Despite this, the majority and concurring opinions concluded that the process currently provided—an ex parte hearing on allegations from the probation department alone—satisfies due process. In reality, an ex parte hearing affords a probationer no meaningful process at all. Due process at its bare minimum means providing notice and a meaningful opportunity to be heard. The Court should grant leave to review the lower court's decision on this issue and should ultimately reverse.

The Court has also asked the parties in its order requiring supplemental briefing to address whether the circuit court had jurisdiction in September 2015 to extend probation. In short, MCL 771.5 governs the trial court's jurisdiction to extend probation after termination, and that jurisdiction is only triggered when the court receives a report in accordance with the timing required by statute. The statute requires the probation officer to report the termination and

conduct of the probationer, "[w]hen the probation period terminates," not after it has terminated. Because the trial court received the report three months after the probation period terminated, it was untimely, and the court's jurisdiction to extend probation was never triggered.

STATEMENT OF FACTS

On June 24, 2013, the trial court sentenced Defendant John Vanderpool to two years of probation after he pled nolo contendere to assaulting, resisting, or obstructing a police officer, MCL 750.81(d)(1), a felony offense. *People v Vanderpool*, 325 Mich App 493, 493; 925 NW2d 914 (2018) ("**Majority Op**"). The Order of Probation was signed and entered on June 28, 2013. (6/28/13 Order of Probation, App 1a-2a.)

Mr. Vanderpool's probation prohibited him from using or possessing controlled substances and alcohol. Majority Op 493. The order of probation also authorized probation agents to conduct compliance checks and search Mr. Vanderpool's property. *Id.* According to the trial court's original sentencing order, Mr. Vanderpool's probation was set to expire on June 24, 2015. (6/28/13 J of Sentence, App 10a-11a.) When Mr. Vanderpool's two-year probation term expired on June 24, 2015, the trial court never issued an official order discharging Mr. Vanderpool from probation.

On September 23, 2015, approximately three months after Mr. Vanderpool's probation period expired, Mr. Vanderpool's probation officer, Jeremiah Hulburt, filed an ex parte petition with the court to extend Mr. Vanderpool's probation by one year, lasting until June 25, 2016. (9/24/15 Pet & Order for Amendment of Order of Probation, App 3a.) The reasons given for the extension request were "to allow for the time he was on warrant status as well [as] time to pay his Court ordered fines and fees." (*Id.*) The trial court granted the probation officer's petition on September 24, 2015. (*Id.*) On September 28, 2015, Mr. Vanderpool's probation officer, Mr.

Hulburt, filed a corrected petition to extend probation to the same date of June 25, 2016. (10/1/15 Pet & Order for Amendment of Order of Probation Amended, App 4a.) The trial court again granted the petition on October 1, 2015. (*Id.*)

On November 12, 2015, Mr. Vanderpool's probation agent petitioned the trial court for a bench warrant because Mr. Vanderpool violated his probation by testing positive for opiates. Majority Op, App 14a. On November 19, 2015, Mr. Vanderpool attended a probation violation arraignment. (11/19/15 Probation Violation Arraignment Hr'g Tr 1, App 5a-9a.) The court informed him of his probation violation and told him that he was entitled to a hearing, where the prosecution would have to establish by a preponderance of the evidence that he in fact violated his probation. (*Id.* at 3, App 7a.) The court then entered a plea of not guilty on Mr. Vanderpool's behalf, appointed Mr. Vanderpool an attorney, and set the matter for hearing. (*Id.* at 4, App 8a.) A subsequent probation violation warrant was issued on December 3, 2015, which states that after November 18, 2015, Mr. Vanderpool stopped reporting on a weekly basis to the probation officer. Majority Op, App 14a-15a.

While on his reinstated probation, on December 30, 2015, probation agents conducted a probationary compliance check. *Id.* at 496. That compliance check led to Mr. Vanderpool's arrest after probation agents found a small amount of contraband in Mr. Vanderpool's residence. *Id.* This resulted in a heroin conviction for possession of less than twenty-five grams of a controlled substance, MCL 333.7403(2)(a)(v), second or subsequent offense, MCL 333.7413(2), and a probation violation. Majority Op, App 12a.

Afterwards, Mr. Vanderpool appealed, claiming his convictions and sentences were invalid because his probation was extended after his probation period had expired. *Id.* at 495-496, App 12a. This was to no avail. The Michigan Court of Appeals held that the trial court

had jurisdiction to modify and extend probation up to the statutory maximum term set by the Legislature, and the majority and concurring opinions concluded that probationers have no right to be heard on whether their probation should be extended. See Majority Op, App 13a-15a; *Vanderpool*, 325 Mich App at 501-503 (O'Connell, J, concurring) ("**Concurring Op**"). The concurring opinion emphasized that due process is a balancing act and the current practice for extending probation satisfies due process given the difference between the loss of liberty following probation revocation and the constraint on liberty imposed by the probation extension. *Id.* However, the dissenting opinion stressed that due process requires a defendant probationer to have notice and an opportunity to be heard before his or her probation period may be extended, as the continuation of probation puts a further constraint on liberty. See *Vanderpool*, 325 Mich App at 503-506 (Jansen, J, concurring in part and dissenting in part) ("**Dissenting Op**").

This Court entered an order granting supplemental briefing and a mini-oral argument on Mr. Vanderpool's Application for Leave to Appeal to address two issues:

> (1) whether the Tuscola Circuit Court had jurisdiction to extend the defendant's probationary term in September 2015; and
>
> (2) whether the extension of the probationary term without notice or a hearing violated the defendant's due process rights. Compare *People v Marks*, 340 Mich 495; 65 NW2d 698 (1954), with *Gagnon v Scarpelli*, 411 US 778 (1973).

STANDARD OF REVIEW

The questions of whether the circuit court had jurisdiction and whether Mr. Vanderpool's due process rights were violated are questions of law and therefore reviewed de novo. *People v Kennedy*, 502 Mich 206, 212; 917 NW2d 355 (2018).

ARGUMENT

The Court of Appeals erred in two ways. First, on the broader issue of what process is due prior to extending probation, the court erred in concluding that a probationer is not constitutionally entitled to notice or a hearing. Neither the majority opinion nor the concurring opinion disputed that extending probation deprives an individual of important liberty interests. But neither opinion undertakes the analysis required under *Matthews v Eldridge*, 424 US 319, 335 (1976), for determining what process is due prior to such deprivation of liberty. At a minimum, this analysis undoubtedly calls for notice and some opportunity to be heard on the probation officer's accusations before the probation is extended.

The narrower (and closer) question is whether the Court had jurisdiction to extend probation after the probation period had terminated. Here, the Court of Appeals overlooked the most important provision in the statute, MCL 771.5, which only allows the court to extend probation after termination if it receives a report from the probation officer "when the probation period terminates." Because the probation officer's report came three months after it terminated, and not "when" it terminated, the court lacked jurisdiction to extend probation. Since it is only necessary to reach the due process question if the court had jurisdiction, the jurisdictional issue will be addressed first.

I. The Tuscola County Circuit Court lacked jurisdiction to extend Mr. Vanderpool's probation on September 15, 2015.

Jurisdiction is the authority to hear and determine a case and the power to act. *State Hwy Comm'r v Gulf Oil Corp*, 377 Mich 309, 312-313; 140 NW2d 500 (1966). Though the Legislature has given circuit courts the power to modify probation orders in MCL 771.2, as the Court of Appeals recognized, the provision specifically addressing extension of probation after

termination of the probation period actually appears in MCL 771.5, which the Court of Appeals did not discuss. That section states:

> (1) When the probation period terminates, the probation officer shall report that fact and the probationer's conduct during the probation period to the court. Upon receiving the report, the court may discharge the probationer from further supervision and enter a judgment of suspended sentence or extend the probation period as the circumstances require, so long as the maximum probation period is not exceeded. [MCL 771.5.]

This provision specifically identifies the singular condition for triggering the circuit court's jurisdiction to extend the probation period after its termination: "receiving the report." If it does not receive the report in accordance with this provision, it lacks jurisdiction to extend probation after the probation period has expired.

This provision also specifies when the report must be provided: "when the probation period terminates." As a relative adverb, the term "when" is defined as "at or on which (referring to a time or circumstance)." Lexico (by Oxford), at www.lexico.com. Here, the Legislature has both determined the time at which the report must be filed and the circumstance under which the report must be filed. It must be filed at the time the probation period terminates. Importantly, MCL 771.5 does not say the probation officer shall report the probationer's conduct "after" the probation period terminates.

Here, the probation officer submitted the report three months after the termination, not "when" the probation period terminated. Because the report does not accord with the plain language of MCL 771.5, it was insufficient to satisfy the condition for triggering the circuit court's jurisdiction to extend probation following termination. Consequently, the circuit court lacked jurisdiction to extend probation.

The Court of Appeals relied on MCL 771.2(5) and *People v Marks*, 340 Mich 495, 498-499; 65 NW2d 698 (1954), to hold that the circuit court had jurisdiction to extend the probation period on September 15, 2015, but neither that statutory provision nor this Court's decision in *Marks* controls Mr. Vanderpool's situation. MCL 771.2(5) states:

> The court shall, by order to be entered in the case as the court directs by general rule or in each case, fix and determine the period and conditions of probation. The order is part of the record in the case. The court may amend the order in form or substance at any time. If the court reduces a defendant's probationary term under subsection (2), the period by which that term was reduced must be reported to the department of corrections.

Marks interpreted a predecessor to this provision which stated:

> If respondent is convicted of an offense not a felony the period of probation shall not exceed 2 years, and if he is convicted of a felony, it shall not exceed 5 years. The court shall by order, to be filed or entered in the cause as the court may direct by general rule or in each case fix and determine the period and conditions of probation and such order, whether it is filed or entered, shall be considered as part of the record in the cause and shall be at all times alterable and amendable, both in form and in substance, in the court's discretion. [*People v Marks*, 340 Mich at 498-499 (quoting 1948 CL 771.3).]

Though these provisions read in isolation suggest the court may amend the order fixing and determining the period and conditions of probation "at any time" or "at all times" *ad infinitum*, this Court in *Marks*, and the Court of Appeals in this case, acknowledged that this is not literally true; there are limits. In *Marks*, this Court read the provision in harmony with the maximum statutory probation period to hold that the Court had jurisdiction to extend probation until the maximum probation period had expired. The Court of Appeals in this case followed *Marks*.

The problem with both of these decisions is that neither one took into account the more important and pertinent provision in play here, MCL 771.5, which specifically governs the

extension of the probation period after the probation period has terminated. "[W]hen a statute contains a general provision and a specific provision, the specific provision controls." *People v Calloway*, 500 Mich 180, 185-186; 895 NW2d 165 (2017). Failure to apply that provision is a mistake, one that results in an interpretation that fails to take into account the Legislature's express intent as to the extent of the court's jurisdiction to extend probation once the probation period has expired. The Legislature provides the conditions for such an extension in MCL 771.5 and those conditions are controlling. They require a probation officer report that is timely, meaning it is provided "when the probation period terminates." This condition was not satisfied here, where the report was given three months after termination, not "when" the probation period terminated.

Granted, to have a statutory scheme that requires the probation officer to file the report in a short window is unusual. But as this Court has made clear time and again, its task is to apply the plain language of the statute, not to conform the statute to what it believes to be the best policy. There is nothing patently absurd about requiring the probation officer to file the report within a particular time frame, or even on a particular day. Nor is that a particularly onerous task. The report can be prepared months in advance if need be and then updated at the last minute before filing.

The Court of Appeals' alternative interpretation—that it can be extended at any time until the maximum statutory period has expired—is far more problematic, as it automatically leaves a Sword of Damocles over the probationer's head until the circuit court issues a discharge, no matter how long the probation period originally ordered. Even if the probation period is only

six months, the probation officer could wait until four years later to file the report, and the court could extend probation to the end of the statutory maximum, as if it had never terminated, leaving another six months during which the probationer must comply with the terms of probation.

The Court of Appeals' interpretation leads to all sort of untenable implications. For instance, a probationer knowing his probation period has expired and told he no longer has to report may have left the state to find employment (which he could not have done while on probation), started a new home, and even started a family out of state. Placing him back on probation means he is by default forced to abandon employment, his home, and his family for the remaining six-month probation period on penalty of being held in violation of probation and having his probation revoked. See MCL 771.3(1)(b) ("The sentence of probation shall include all of the following conditions: . . . . (b) During the term of his or her probation, the probationer shall not leave the state without the consent of the court granting his or her application for probation.").

Worse, probation can then be instantly revoked at the whim of the circuit court, and the probationer can be sentenced to whatever term years might have been imposed "if the probation order had never been made." MCL 771.4. While MCL 771.4 only allows the revocation of probation "during the probation period," the unlimited ability to extend the probation period after it expires provides a runaround, such that the probationer whose probation period expired but receives no discharge is effectively subject to re-incarceration at any time during the five-year period for no more reason than the court believes it is for the "public good." See *id*. This runs contrary to the apparent intent of MCL 771.4 to place a tighter limit on revocations and flies in the face of the fundamental fairness that should be afforded probationers.

In sum, MCL 771.5 serves as an important limitation on the circuit court's jurisdiction to extend probation after it has terminated, one that governs over other general provisions in the statute that the Court of Appeals analyzed. Because the report in this case was filed "after" the probation period terminated and not "when the probation period terminate[d]," the circuit court was without jurisdiction to extend probation under MCL 771.5.

II. The extension of Mr. Vanderpool's probation period without notice or a hearing violated his due process rights.

Both the United States Constitution and the Michigan Constitution of 1963 dictate that no person may be deprived of liberty without due process of law. US Const Am XIV; Const 1963, art 1, § 17; *Zinermon v Burch*, 494 US 113, 125 (1990) (citations omitted) (emphasis omitted) ("In procedural due process claims, the deprivation by state action of a constitutionally protected interest in life, liberty, or property is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest without due process of law."). Due process of law "at a minimum" requires that a "deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing." *Mullane v Central Hanover Tr Co*, 339 US 306, 313 (1950). Due process rights are "not confined to judicial proceedings, but extend[] to every case which may deprive a citizen of life, liberty, or property, whether the proceeding be judicial, administrative, or executive in its nature." *Hendershott v Rogers*, 237 Mich 338, 348; 211 NW 905 (1927). The waiver of the notice and hearing requirement is only permitted in "extraordinary situations." *United States v James Daniel Good Real Prop*, 510 US 45, 53 (1993). Here, there were no extraordinary circumstances. Mr. Vanderpool was deprived of important personal liberties through the extension of this probation without notice or an opportunity to be heard merely because MCL 771.5 does not provide for such process. This was a violation of his constitutional due process rights.

A. The *Matthews v Eldridge* test for determining what process is due cannot be satisfied (absent some exigency) by anything less than prior notice and a hearing before extending probation.

There can be no serious question that the terms of probation deprive a probationer of "the absolute liberty to which every citizen is entitled" by creating a "conditional liberty properly dependent on observance of special parole restrictions." *Gagnon v Scarpelli*, 411 US 778, 781 (1973). The United States Supreme Court has laid out a test to determine the due process that is required for a particular deprivation of rights. *Matthews v Eldridge*, 424 US 319, 335 (1976). There are three factors to be balanced: (i) the importance of the private interest that will be affected; (ii) the risk of an erroneous deprivation of such interest through the procedure currently used, as well as the value of providing additional safeguards; and (iii) the government's interest, including the function involved and the burdens that the additional safeguards would cause. *Id.* at 335. When this test is applied to the decision of whether to extend the terms of probation, it shows that notice and a hearing should be provided.

1. Extension of probation results in a significant deprivation of liberty interests.

The U.S. Supreme Court has held that liberty encompasses the right of an individual "to enjoy those privileges long recognized as essential to the ordinary pursuit of happiness by free men." *Bd of Regents of State Colls v Roth*, 408 US 564, 572 (1972). "Probation, like incarceration, is a form of criminal sanction imposed by a court upon an offender after verdict, finding, or plea of guilty" that "deprive[s] the offender of some freedoms enjoyed by law-abiding citizens." *United States v Knights*, 534 US 112, 119 (2001). In short, to impose probation is to deprive a person of some liberty.

It is self-evident that extending a person's probation is as much a deprivation of liberty as ordering probation in the first instance. A probationer whose probation expires after two years

regains all of the freedoms enjoyed by law-abiding citizens at the start of the third year. An order extending probation into a third year deprives the probationer of those freedoms in the third year. It is an additional deprivation of liberty. On this, both the concurring and dissenting judges on the panel below agree. Compare Concurring Op with Dissenting Op. And the majority opinion did not state otherwise. See Majority Op.

The private liberty interests affected by the conditions of probation are profoundly important; individuals on probation *at a minimum* may not leave the state without permission and must report to a probation officer at least once a month. MCL 771.3(1). Beyond that, the court has discretion to impose much more stringent conditions. *Id.* In Mr. Vanderpool's case, the order imposed a curfew from 11 pm to 6 am, allowed the field agent to enter his home at any time for probation supervision, and forced Mr. Vanderpool to submit to a search of his person and property without a warrant if the agent had reasonable cause to believe Mr. Vanderpool had violated probation. (06/28/2013 Probation Order, App 2a.) He lost substantial liberty for one-quarter of the day, lost some degree of his right to privacy, and lost some degree of freedom from warrantless search and seizure. Probation also subjects the probationer to any number of other statutorily available restrictions, up to and including electronic monitoring and even house arrest, see MCL 771.3(2)(l), (k). Given that the terms of probation may be modified "at any time" during the probation period, MCL 771.2(5), an extension of probation comes with the potential that those restrictions will be imposed then, or at some point thereafter. It cannot seriously be contested that the extension of probation deprives the individual of significant liberty interests.

2. The risk of erroneous deprivation of those interests in an ex parte proceeding is unacceptably high.

When an individual is given no opportunity to defend himself or herself against the claims of a probation officer, the risk of an erroneous deprivation is extremely high. See *James*

Daniel Good Real Prop, 510 US at 44 (stating that ex parte proceedings create "an unacceptable risk of error, since the proceeding affords little or no protection" to the non-movant). To the extent that an ex parte proceeding constitutes "process," it is perhaps the least protective process of all, short of unilateral, ex parte decision-making by the probation officer. Busy courts presented with a negative report by the probation officer will be loath to question the officer's representations when there is no countervailing argument or evidence and, frankly, would rarely have any rational basis to do so. At the same time, the probation officers carry their own heavy load, and are not beyond making mistakes, even to the point of confusing the facts between one probationer and another. Certainly documentation helps. But not every probation officer will be a savvy administrator who regularly documents encounters with probationers in a timely or reliable way. Ultimately, when no one else is there to question the facts as reported by the probation officer, it is highly unlikely the court will uncover those mistakes on its own. The risk that a mistake will be made is nearly as high as if there were no judicial review at all.

3. The government ordinarily has no legitimate interest in denying the probationer notice or a hearing, and the burden of providing these protections is de minimis.

Third, the government's interest in extending probation without any kind of notice or hearing is insignificant at best, while the corresponding burden of doing so is minimal. The probation agent is already assigned to the case and tasked with writing a report, which must be filed with the court, and the court is already required to consider the report prior to making a decision. Providing notice of the report and some opportunity to be heard places no real burden on the government. This is indisputably true when the probationer has been reporting regularly to the probation officer, but is also true when the probationer has not. The probationer must somehow be put on notice of the extension at some point to comply with the extended terms of

probation. See *State v Korzuch*, 186 Ariz 190, 194; 920 P2d 312 (1996) (holding "[i]f defendant must be informed of each single term of his probation, it seems especially important that defendant be informed that all the terms will be extended for a period of years."). Any marginal increase in the burden on the government of providing such notice and an opportunity to be heard before the extension is decided would be de minimis. There is no apparent legitimate reason why the government should be interested in preserving the ex parte nature of the procedure.

4. The Matthews *factors weigh heavily in favor of requiring notice and a hearing prior to the extension of probation.*

The Court should easily conclude that these factors weigh heavily in favor of requiring notice and an opportunity to be heard prior to the extension of probation. Given the serious restraints on movement and other absolute liberties enjoyed by the average citizen, it is not an inconsequential infringement of liberty to extend the probation period for months or years. There is really no question that the significant level of liberty deprivation at stake deserves more than the virtually non-existent procedural protection of a busy probation officer submitting a report ex parte to a busy Court for decision without hearing from the probationer. The government's incremental burden of providing notice before the court makes its decision rather than after cannot justify the lack of procedural protection.

That is why the Sixth Circuit as well as other states have already held that ex parte proceedings to extend probation are prohibited. The Sixth Circuit implemented this rule in order to "avoid any potential for prejudice" and allow the individual to present any "mitigating circumstances [that] affect the need for extension." *Forgues v United States*, 636 F2d 1125 (CA 6, 1980). The Arizona Supreme Court has implemented a similar rule utilizing probation revocation precedent. The court held that "[a probation] extension requires notice to the probationer

that his term will be extended." *Korzuch*, 186 Ariz at 193. The Supreme Court of Virginia, having already held that notice and a hearing were required prior to revocation of parole, held long ago that "the same rationale of fundamental fairness requires a judicial hearing of a summary nature for the probation period to be extended, since increasing the period of probation has the effect of extending the restraints on the probationer's liberty which are normally incident to his probation and extends the time period during which revocation may occur." *Cook v Commonwealth*, 211 Va 290, 292-293; 176 SE2d 815, 817-818 (1970); see also *State v Orr*, 2005 UT 92; 127 P3d 1213, 1216-1218 (2005) (holding that minimum due process requires notice and hearing before probation is extended).

This Court's precedents requiring notice and a hearing prior to a property deprivation likewise support imposing that same process here when one compares the significance of the property interest in those cases to the important liberty interests at stake here. In *Mudge v Macomb County*, 458 Mich 87, 93-94; 580 NW2d 845 (1998), the defendants had $10,000 in bond money seized by Macomb County to reimburse expenses from their incarceration in Macomb County jail. This Court held that the defendants should have been provided with notice and an opportunity to be heard before their bond money was seized. *Id.* at 101. In its reasoning, this Court held that the plaintiffs' arguments implied that defendants treated the bond money as if it has been forfeited to the county or as if it was a judgement owed. *Id.* The defendants definitively owed this money to the county. *Id.* at 93. However, "there can be no doubt that at a minimum . . . notice and opportunity for hearing appropriate to the nature of the case" are required to precede the adjudication. *Id.* at 101 (quoting *Mullane*, 339 US at 313). In *Dow v State*, 396 Mich 192, 195; 240 NW2d 450 (1976), the State foreclosed on a property for unpaid taxes; the only notice that was given was in a newspaper publication. *Id.* This Court held that the due

process clause required proper notice and the opportunity for a hearing to the owners with a significant interest in the property before foreclosure. *Id.* The Court explained that even "[w]here a man's automobile or color television set is at stake, due process requires notice and a prior hearing before a creditor is entitled to retake possession." *Id.* at 209.[1] If the potential deprivation of a TV or bond money requires more than an ex parte hearing, how can an ex parte hearing be acceptable in depriving an individual of the freedom to leave the state or even his own home, among other things? It cannot.

B. The Court of Appeals mistakenly relied on *Marks* to hold that no process is due and failed to see that *Gagnon* recognizes important liberty interests are affected by the terms of probation.

The Court of Appeals majority summarily dismissed the dissent's argument that a hearing on the probation extension was required without considering and weighing the above factors, mistakenly believing this Court had rejected that position in *Marks*.[2] In *Marks*, the trial judge extended a probation order that had expired without notice to the defendant or his attorney. 340 Mich at 498. The defendant sought dismissal of the petition for extension and vacation of the order granting it on both jurisdictional and due process grounds. *Id*. at 497-498. However, this

[1] The United States Supreme Court has likewise condemned the use of ex parte hearings where there is a property interest at stake. See *Sniadach v Family Fin Corp*, 395 US 337, 342 (1969) (holding that the obvious taking of one's property without notice or a hearing was a violation of the fundamental principles of due process); *Fuentes v Shevin*, 407 US 67, 96 (1972) (holding that replevin upon ex parte applications to a court clerk without notice were in violation of due process).

[2] The other cases the majority cited did take the broad position that no hearing is required prior to amendment of a probation order. See *People v Britt*, 202 Mich App 714, 716; 509 NW2d 914 (1993) (holding that a court could place a probationer on a tether program ex parte during the ongoing probation period); *People v Kendall*, 142 Mich App 576, 579; 340 NW2d 631 (1985), (holding that the defendant was not entitled to prior notice and a hearing before the probation period was extended by six months). Both cases relied on *Marks* and on other cases that in turn relied on *Marks*.

Court stated that the dispositive issue on appeal was: "Did the trial court have jurisdiction and authority to extend the probation period for an additional 2 years and alter the original terms of probation to include restitution after the original period of probation had expired?" *Id*. at 498. While the concept of due process arose through some of the quotations to case law, the question of whether to provide a hearing was not one the Court directly set out to answer, and there is little indication that it did answer that question. It may be that the defendant abandoned the issue on appeal. In any event, the Court's final ruling said the extension was valid, "even though the conditions of the original order had not been violated and its term had expired." *Id*. It made no mention there of the lack of notice or hearing.

That said, *Marks* did, in the course of its analysis, quote several passages from other cases holding that no hearing is required to amend or extend the terms of probation. For one, the Court quoted its own decision in *People v Good*, specifically the passage holding that no hearing was required in determining the amount of restitution that must be paid as a condition for probation. 287 Mich 110, 114-115; 282 NW 920 (1938). Most importantly, *Marks* quoted extensively from *Burns v United States*, 287 US 216, 220 (1932), which held that the decision to revoke probation would be reviewed only for abuse of discretion, and not for whether any formal procedure was followed. See *Marks*, 340 Mich at 500. *Marks* found noteworthy the discussions in *Burns* and *Good* that relied heavily on the proposition that probation is not a matter of right, but of grace. See *id.* ("Probation is thus conferred as a privilege, and cannot be demanded as a right. It is a matter of favor, not of contract." (quoting *Burns*, 287 US at 220)); see also *id*. at 499 ("Probation is not a matter of right but rests in the sound discretion of the court." (quoting *Good*, 287 Mich at 115)). It can easily be inferred that the *Marks* court viewed this principle as a major premise for its conclusion that the court had authority to extend probation after the probation

period had expired. The concurrence in this case latched on to this rationale as a basis for holding that no more process is due than an ex parte hearing. See *id*. at 501 (O'Connell, J, concurring).

While this was at one time a rationale for holding that a probationer has no "right" or "privilege" at stake that would call for due process protection, the maxim no longer supports that conclusion in light of *Gagnon v Scarpelli*, 411 US 778 (1973), and its progenitor, *Morrissey v Brewer*, 408 US 471 (1972). In *Morrissey*, the United States Supreme Court addressed the question of "whether due process applies to the parole system." *Id*. at 477. In concluding that it did, the Court observed that it "now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.' " *Id*. at 481 (quoting *Graham v Richardson*, 403 US 365, 374 (1971)). The *Gagnon* court extended *Morrissey*'s holding to the probation system, holding that revocation of probation without a hearing is constitutionally impermissible. 411 US at 781. The Court said that where a probationer's liberty interests are reduced, he "can no longer be denied due process in reliance on the dictum . . . that probation is 'an act of grace.' " *Id.* at 782 n 4.

The concurring opinion here does recognize that "[d]ue process is a balancing act." But it then somehow concludes that "[t]he procedure for extending or amending probation already satisfied due process" without actually engaging in the balancing required under *Matthews*, 424 US at 335. The concurrence's observation that probation revocation is complete loss of liberty while probation extension is just a constraint on liberty does not militate a conclusion that the liberties constrained are too insignificant to warrant greater procedural protection than the highly unprotective ex parte proceeding currently in use. As demonstrated above, they are at least deserving of at least the minimum protection of notice and some opportunity to be heard.

CONCLUSION AND RELIEF REQUESTED

Though the Court of Appeals does not deny that an extension of probation is a deprivation of liberty, it nevertheless erroneously held that essentially no process is due, other than the ex parte process currently in place, which affords the probationer no notice or opportunity to be heard. Absent exceptional circumstances, due process of law "at a minimum" requires that a "deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing." *Mullane*, 339 US at 313. The Court should hold that notice and hearing are ordinarily required prior to extending probation and were required in this case. Because Mr. Vanderpool was denied notice and an opportunity to be heard on the extension of his probation, his due process rights were violated, and the Court of Appeals' decision should be reversed.

Respectfully submitted,

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